United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1046

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ISRAEL SAFRIN,

Defendant-Appellant.

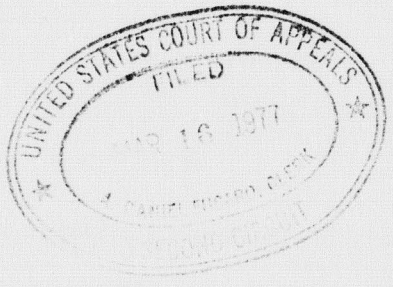
----------X

B P/S

Docket No. 77-1046

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK,
AFFIRMING A JUDGMENT
OF THE UNITED STATES MAGISTRATE'S COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
ISRAEL SAFRIN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,

Of Counsel.

Contents

Table of Cases

Other Authorities

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- ISRAEL SAFRIN, Defendant-Appellant.	Docket No. 77-1046

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK,
AFFIRMING A JUDGMENT
OF THE UNITED STATES MAGISTRATE'S COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the sentence imposed upon appellant in this case is illegal because the magistrate failed to evaluate the applicability of the Youth Corrections Act in accord with the Congressional mandate.

STATEMENT PURSUANT TO RULE 28(a)(3), F.R.A.P.

Preliminary Statement

This is an appeal from a judgment of the District Court for the Eastern District of New York (The Honorable Thomas C. Platt) affirming a judgment of the United States Magistrate's Court for that district (The Honorable Vincent A. Catoggio) rendered on August 30, 1976, convicting appellant Israel Safrin, upon his plea of guilty, of obstructing the passage of the mails, in violation of 18 U.S.C. §1701.

Imposition of sentence was suspended, and appellant was placed on probation* for three years and was required to pay a fine of $100.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

---

*As a special condition of probation, appellant Safrin was required to make full restitution of any moneys he had obtained from the alleged enterprise. In a letter dated January 13, 1977, U.S. Probation Officer Fredrick P. Schramm, indicated that appellant has already made full restitution and has satisfied this special condition.

Statement of Facts

A. The Information* and Plea Proceedings

On July 9, 1976, an information was filed, charging that on or about November 5, 1975, appellant obstructed the mails by possessing a check which had been enclosed in a letter sent to Beatrice Serafini of Brooklyn, New York. At the time of this petty offense,** appellant, who was born on March 20, 1954, was 21 years old. On July 19, 1976, ten days after the filing of the information, appellant entered a plea of guilty to the offense charged.

B. The Sentencing Proceeding***

On August 30, 1976, appellant appeared before Magistrate Catoggio for sentencing. After a short statement by appellant, defense counsel explained that the presentence report reflected appellant's exemplary background and showed appellant to be a hard-working person who had never before been in any kind of trouble, a teacher, and a college student. Despite the fact

---

*The information is "B" to the separate appendix to appellant's brief.

**The offense charged, 18 U.S.C. §1701, provides a maximum penalty of six months' imprisonment and $100 fine.

***The transcript of the sentencing proceeding is "C" to the separate appendix to appellant's brief.

that the presentence report reiterated three times that appellant was a teacher, the magistrate immediately interrupted to ask:

> MAGISTRATE CATOGGIO: He's a teacher?[*]
>
> MS. SELTZER [Defense Counsel]: Yes, he's a teacher.
>
> MAGISTRATE CATOGGIO: Where?
>
> MS. SELTZER: He teaches at a ...
>
> THE DEFENDANT: A parochial school.
>
> MS. SELTZER: In Brooklyn ...
>
> (Appendix C at 3).

Counsel further explained that the members of appellant's family had suffered grievously from the criminal charge against appellant, and "if ever there was a case where you will not see this man again, this is certainly the case" (Appendix C at 3).

After this presentation, Magistrate Catoggio expressed doubt as to his power to sentence appellant under the Youth Corrections Act ("the Act"), saying: "You are [sic] over 22 when you pleaded guilty, so there's a question whether I can sentence you as a young adult offender." Appendix C at 4. Further colloquy ensued regarding the applicability of the Act, during which counsel requested that the magistrate re-read the pre-

---

*The fact that appellant is a teacher at a yeshiva in Brooklyn was repeated on pages 7, 12, and 13 of the presentence report. It is respectfully requested that this Court examine the presentence report, a reading of which is essential to an understanding of the issue presented for review.

sentence report, since "apparently [the magistrate was] not familiar with what's in the conclusions in the report..." (Appendix C at 4). Ignoring this request, the magistrate concentrated on the crime involved, stating "that the trouble is that this was not an isolated check." Appendix C at 4.

Trial counsel persisted, contending that it would be a grave injustice if serious consideration were not given to sentencing appellant pursuant to the Youth Corrections Act. The magistrate referred to a recent Court of Appeals decision finding error in the application of the Act to a "boy over 22." Counsel explained that the defendant in that case did not have appellant's background or potential. The magistrate responded:

> Yes, Mr. Safrin has been involved as you say in 7 checks, it's not an isolated case.
>
> (Appendix C at 5).

Defense counsel repeated that based on the information contained in the presentence report there was absolutely no reason for believing that any future criminal activity would occur, and consequently no justification to saddle appellant with a criminal record for the rest of his life. The magistrate responded:

> Oh, that's something he should have thought of, he had 7 times, 7 chances to determine whether he wanted a criminal record. It's not an isolated case.
>
> (Appendix C at 6).

After further argument about the applicability of the Youth Corrections Act, the magistrate again repeated that "it wasn't

an isolated case, it was 7 different checks..." He then sentenced appellant to three years' probation, requiring full restitution, and a fine of $100,* without benefit of the Youth Corrections Act.

C. The Presentence Report

The presentence report confirmed counsel's description of appellant's background and exemplary prior life.

Appellant had never before been arrested nor in conflict with the authorities. His parents, married 23 years, stated that appellant was "a good son," and could offer no explanation for appellant's aberrant recent criminal behavior. Appellant's father, an ordained rabbi, has, for the past 10 years, been co-owner of a watch company in Brooklyn; appellant's mother also works. Appellant is one of five children and is the product of a stable home, free of discord, where appellant still lives.

Appellant was raised in a strict atmosphere in an orthodox Jewish home in a middle-class section of Brooklyn, New York, and currently attends religious services on a daily basis. He attended a Jewish parochial school in Brooklyn and Telshe High School (also a Jewish parochial school) in Ohio. He graduated

---

*Appellant's co-defendant, Samuel Strasser, was sentenced on August 31, 1976. Magistrate Catoggio sentenced Strasser to three years' probation under the Youth Corrections Act, with a special condition requiring full restitution, and to a $100 fine. At the time of Strasser's guilty plea, he was 21 years and 11 months of age, while appellant was 22 years and 4 months.

from that high school on June 18, 1972, and continued his Jewish studies from that time to the present at Miner Yeshiva in Brooklyn. Moreover, since July 1973, appellant has been enrolled in Brooklyn College, where he majors in accounting, attending classes at night. Prior to this offense, appellant had hoped to pursue a career in the accounting profession.

The presentence report also reflects that during the academic year, appellant is employed, teaching secular studies at Yeshiva Torah Vodaath and Mesevta in Brooklyn, for which he is paid $260 per month.

Appellant's health is good, and he has never been treated for any serious illness or emotional problems. During the investigation by the authorities, appellant immediately cooperated, admitting his involvement and advising the authorities of the identity of appellant's co-defendant.

The Probation Department gave the following explanation for appellant's criminal acts:

> He impressed as a young man who is somewhat immature and is still searching for his identity in life. In this regard, he appears to be rather unsettled with his religious beliefs and there are indications that his actions in the instant offense may have been an attempt on his part to rebel against what he describes as a strict upbringing.
>
> Presentence Report at 11.

Moreover, the Probation Department concluded that "if [appellant] is provided the proper guidance, he can remain a law-abiding citizen."

D. The Appeal to the District Court

Pursuant to Rule 8 of the Rules for the Trial of Minor Offenses, appellant appealed his judgment of conviction, arguing that his sentence was illegal, since the Magistrate failed to determine whether to impose a Youth Corrections Act sentence by considering factors other than the criminal conduct of the appellant, as is required by statutory provisions.

Oral argument was heard on January 21, 1977. At that time, Judge Platt affirmed the conviction in open court and did not render a written opinion.*

---

*A copy of Judge Platt's order affirming the judgment of conviction is "D" to appellant's separate appendix.

ARGUMENT

THE MAGISTRATE FAILED TO EVALUATE THE APPLICABILITY OF THE YOUTH CORRECTIONS ACT IN ACCORD WITH THE CONGRESSIONAL MANDATE, AND THE SENTENCE IMPOSED IS THEREFORE ILLEGAL.

At the time of his conviction and sentence, appellant, who was 22 years of age, was eligible, because of his age, to treatment under the Youth Corrections Act ("YCA") as a "young adult offender." 18 U.S.C. §4216;* United States v. Negron, slip op. 1255, 1257-1258 (2d Cir. January 6, 1977); United States v. Torun, 537 F.2d 661, 663 (2d Cir. 1976); United States v. Schwarz, 500 F.2d 1350, 1351 (2d Cir. 1974); United States v. Glasgow, 389 F.Supp. 217, 220 (D.D.C. 1975).

In determining whether to apply this sentencing option, the sentencing judge is required by the relevant statute to consider four specific factors. He can, in addition, consider any other he deems pertinent. 18 U.S.C. §4216; United States v.

---

*18 U.S.C. §4216, which, until the Parole Commission and Reorganization Act (March 19, 1976) was codified as 18 U.S.C. §4209, provides:

> In the case of a defendant who has attained his twenty-second birthday but has not attained his twenty-sixth birthday at the time of conviction, if, after taking into consideration the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there is reasonable grounds to believe that the defendant will benefit from the treatment provided under the Federal Youth Corrections Act ... sentence may be imposed pursuant to the provisions of such Act.

Negron, supra, slip op. at 1258; Stead v. United States, 531 F.2d 872 (8th Cir. 1976); United States v. DiNapoli, 519 F.2d 104, 109 (6th Cir. 1975). The specific criteria enumerated in 18 U.S.C. §4216 are "the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, and mental and physical health." See United States v. Glasgow, supra, 389 F.Supp. at 223. Here, in disregard of this mandate, Magistrate Catoggio failed to consider these criteria. Rather, he erroneously denied Youth Corrections Act treatment premised on the crime involved, stating four times that appellant's acts were not "an isolated case." (Appendix C at 4, 5, 6, 8.)

However, consideration of this factor alone is insufficient justification for the denial of a YCA sentence. United States v. Kaylor, 491 F.2d 1133, 1137 (2d Cir. en banc), vacated and remanded on other grounds, sub nom. United States v. Hopkins, 418 U.S. 909 (1974). As this Court in Kaylor found:

> Nowhere is t ere any indication that the type of crime committed, elements of immorality or violence involved therein, or related factors are to be considered per se to require denial of treatment under the Act, even though Congress knew exactly how to do this both in the Juvenile Delinquency Act, 18 U.S.C. §5032, and in the Narcotics Addiction Rehabilitation Act, 18 U.S.C. § §4251(f)...
>
> United States v. Kaylor, 491 F.2d supra at 1137.

See also United States v. Schwarz, supra. Moreover, while the sentencing judge need not make any explicit findings, it must

be "clear from the record that all relevant factors were considered." United States v. Negron, supra, slip op. at 1258.

To the contrary, the record here shows that this procedure was not followed* and that the Magistrate's denial of treatment under the Youth Corrections Act, based exclusively on the crime alleged, violated the requirements set forth by the applicable statute, as well as pertinent case law. 18 U.S.C. §4216; Dorszynski v. United States, 418 U.S. 424, 443 (1974); United States v. Negron, supra; United States v. Schwarz, supra, 500 F.2d at 1351-1352; United States v. Wilson, 450 F.2d 498 (6th Cir. 1971). Indeed, the record indicates that in making this determination, Magistrate Catoggio completely ignored the very factors that the statute directs be considered and that were contained in appellant's presentence report,** prepared by the Probation Department for this very purpose. This information included the following: that the instant episode was

---

*The record here is in stark contrast to that in Negron, where the Court found that the sentencing proceeding reflected Judge Costantino's careful reading of the presentence report, as well as his consideration of all relevant factors. United States v. Negron, slip op., supra, at 1258.

**During defense counsel's presentation, she mentioned that appellant was a teacher, a fact repeated three times in the presentence report but which appeared subsequent to the description of appellant's criminal activity in this case. Magistrate Catoggio's immediate surprise at this fact allows no other conclusion than that he failed to read beyond that portion of the presentence report that describes the offense involved. This circumstance alone would require reversal. See United States v. Stein, 544 F.2d 96, 100, 103-104 (2d Cir. 1976); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970). Indeed, because of the magistrate's obvious unfamiliarity with the presentence report, trial counsel asked that he re-read it.

appellant's first conflict with the authorities; that appellant, 21 years old at the time of the crime, was the product of a stable, middle-class home, having graduated from Jewish parochial primary and secondary schools; that he currently continues his Jewish education at a yeshiva in Brooklyn while attending Brooklyn College at night; that during the day appellant teaches secular studies at another yeshiva in Brooklyn; that he is an observant Jew, attending religious services on a daily basis; and that his mental and physical health are good.*

In addition, the record reflects appellant's hopes to pursue a professional career. This expectation reflects the underpinning of a constructive and law abiding attitude, nurtured and reinforced by appellant's family and background. Moreover, when confronted, appellant immediately cooperated with the

---

*The presentence report summarized appellant's background in the following manner:

> Reared in a devout, strict family atmosphere, there are indications that the defendant while a teenager may have had difficulty communicating with his father. Nevertheless, family members indicate he never caused serious behavior problems. After graduating from high school, he continued his religious education and remains studying at a local yeshiva. In addition, for the past three years, he has been an evening student at Brooklyn College. A teacher at a parochial elementary school for the past school year, he now has a temporary summer job with plans to resume teaching in the fall. The defendant is single and continues to reside with his parents in the Boro Park section of Brooklyn.
>
> Presentence report at 13.

authorities, admitted his guilt, and attempted to make full restitution, a hopeful sign of contrition and rehabilitation. See United States v. Stein, supra, 544 F.2d at 104 (Lumbard, C.J., concurring).

Thus, based on the factors considered by Congress and the relevant case law to be important and which were present here, the presentence report concluded that this criminal episode was the result of immaturity and youthful rebellion on the part of appellant, but further found that, with proper guidance, appellant could remain a law-abiding citizen. Presentence report at 11, 13. By attempting to rehabilitate and not punish, the Youth Corrections Act was designed to deal with precisely this kind of problem. Dorszynski v. United States, supra, 418 U.S. at 433-434; United States v. Kaylor, supra, 491 F.2d at 1136. See Note, Sentencing Under the Federal Youth Corrections Act, 33 B.U.L. Rev. 1071, 1077 (1973).*

While the decision to apply the YCA to a young adult offender, such as appellant, is within the discretion of the sentencing judge, it cannot be denied without a proper exercise of that discretion and full consideration of the relevant fac-

---

*As this Court stated, quoting the Note, supra at 1077:

> "Congress was responding in part to the findings by psychologists and sociologists that there were 'special causations' of antisocial tendencies in adolescents..."
>
> United States v. Kaylor, supra, 491 F.2d at 1036.

tors articulated by Congress.* Dorszynski v. United States, supra, 478 U.S. at 443; United States v. Negron, supra, slip op. at 1258; United States v. Schwarz, supra, 500 F.2d at 1351-1352; United States v. Wilson, 450 F.2d 495, 497-498 (4th Cir. 1971); see also United States v. Mitchell, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman, Ch.J., concurring). Here, Magistrate Catoggio's out-of-hand denial of treatment under the Youth Corrections Act, based solely on the crime involved, was just such a failure to exercise his discretion properly, and requires vacatur of the sentence and remand for re-sentence before a different magistrate, the preferred practice. United States v. Robin, 545 F.2d 775, 782 (2d Cir. 1976), and cases cited therein; United States v. Schwarz, supra, 500 F.2d at 1352; see also United States v. Stein, supra, 544 F.2d at 104.

---

*Indeed, the individualized approach to sentencing, required by numerous decisions (see United States v. Schwarz, supra, 500 F.2d at 1352; see also Williams v. New York, 337 U.S. 241 (1949); United States v. Baker, 487 F.2d 360, 361-363 (2d Cir. 1973); United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974); Woosley v. United States, 468 F.2d 139, 144 (8th Cir. 1973); United States v. Daniels, 446 F.2d 967, 970 (6th Cir. 1971)) means that the sentencing judge must take into consideration the unique qualities of background and character that are part of the particular defendant. This accepted rule, required in all sentencing procedures even absent the provisions of the Youth Corrections Act, was violated by Magistrate Catoggio's actions in this case.

CONCLUSION

For the foregoing reasons, the sentence of the magistrate imposed in this case should be vacated, and the case remanded to a different magistrate for re-sentence.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ISRAEL SAFRIN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,

Of Counsel.

March 16, 1977

CERTIFICATE OF SERVICE

March 16, 1977

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Jonathan Silbermann